Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-857

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARC GILBERT DOGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the delay between the return of the indictment and petitioner's arrest violated his Sixth Amendment right to a speedy trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 64-105) is reported at 906 F.2d 573. The order of the district court (Pet. App. 62-63) adopting the report and recommendation of the magistrate (Pet. App. 1-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1990. A petition for rehearing was denied on September 12, 1990. Pet. App. 106-108. The petition for a writ of certiorari was filed on Novem-

ber 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 22, 1980, petitioner was indicted in the United States District Court for the Middle District of Florida on charges of conspiracy to import cocaine (Count 1) and conspiracy to possess cocaine with intent to distribute it (Count 2), in violation of 21 U.S.C. 963 and 846. Following petitioner's arrest on September 5, 1988, he moved to dismiss the indictment for an alleged violation of his constitutional right to a speedy trial. After that motion was denied, petitioner entered a conditional guilty plea to Count 1. Imposition of sentence was suspended in favor of three years' probation, and petitioner was fined $1,000. The court of appeals affirmed.

1. The circumstances surrounding the passage of eight years between the return of the indictment and petitioner's arrest were developed at a pretrial hearing on petitioner's motion to dismiss. The evidence showed that in late 1979, petitioner and Allen Lee Riddle were using flight attendants to import cocaine from Fabio Moreno in Colombia. DEA Agent Douglas Driver negotiated the purchase of 40 kilograms of cocaine from Moreno. Moreno sent Agent Driver to petitioner in Raleigh, North Carolina, to obtain a sample of the cocaine. On November 24, 1979, petitioner gave Driver 5.7 grams of cocaine and $6,800 in cash and told him to give the cash to Moreno in Colombia. Thereafter, Agent Driver assisted the Colombian police in seizing 40 kilograms of cocaine and arresting nine persons in Colombia. The officers were not, however, able to arrest Moreno. Gov't C.A. Br. 4-5.

Petitioner and seven others were indicted on charges stemming from the aborted importation on February 22, 1980. On March 18, 1980, two North Carolina officers went to the home of petitioner's parents in Raleigh.[1] His mother told the officer that petitioner had left four days earlier for Colombia to get cocaine, and she agreed to notify the agents if he came home. Agent Driver entered petitioner's name in the Treasury Enforcement Communication System (TECS), and he alerted all United States Customs stations and INTERPOL. Without Driver's knowledge or permission, however, petitioner's name was deleted from the TECS computer several months later. The following year, Agent Driver completed a fugitive declaration form for the purpose of entering petitioner's name in the National Crime Information Center (NCIC) computer system, after discovering that his entries into the other systems had not automatically resulted in the entry of petitioner's name in the NCIC system as well. Gov't C.A. Br. 5-6; Pet. App. 4-5, 67-68.

In October 1981, Agent Driver learned that petitioner had been arrested the previous month in Panama for importing cocaine into that country. At Agent Driver's instance, a DEA representative in Panama made a formal request to have petitioner expelled to the United States at the conclusion of the proceedings in Panama. On October 15, 1981, the

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[1] Two of petitioner's co-defendants were arrested that day and tried and convicted the following September. *United States* v. *Barnes*, 681 F.2d 717 (11th Cir. 1982). The government did not attempt to arrest any of the defendants between February 22 and March 18, 1980, because it was trying to lure some of the foreign defendants into the United States in order to accomplish a simultaneous arrest of as many of the defendants as possible. Gov't C.A. Br. 5.

DEA office in Panama received a letter from the Attorney General of Panama agreeing to that request.[2] Agent Driver thereafter assumed that petitioner was serving a sentence in Panama, and he heard nothing more about petitioner until 1985, when Agent Driver was transferred to Panama. Upon arriving in Panama, Agent Driver checked on petitioner's status and learned that he had been released but could not be located. Agent Driver investigated further and learned from the State Department that petitioner had been released to return to Colombia in July 1982. Agent Driver made no further attempt at that time to locate petitioner, because he believed petitioner was living in Colombia and assumed that petitioner would be apprehended if he tried to enter the United States. Gov't C.A. Br. 6-8; Pet. App. 8-12, 68-72.

According to petitioner's passport, he returned to the United States on September 25, 1982. His mother saw him one year later and chose not to tell him about the outstanding charges. Petitioner moved to Reston, Virginia, in October 1983. In September 1988, the United States Marshals began searching for approximately 8,000 fugitives as part of a special narcotics fugitive apprehension program. Using a credit checking machine, they found petitioner's Reston address and arrested him on September 4, 1988. Gov't C.A. Br. 8-9; Pet. App. 11 n.5, 19-21, 72-74.

Despite the passage of eight years, petitioner's codefendants, Agent Driver, and the government informant were available to testify at trial. However, 17 tape recordings made during the investigation had

[2] This expulsion procedure had worked in other cases, both before and after petitioner's arrest in Panama. Gov't C.A. Br. 7.

been lost and were not available for use as evidence against petitioner. Gov't C.A. Br. 10; Pet. App. 95-97.

2. Following an evidentiary hearing, the magistrate recommended to the district court that it deny petitioner's motion to dismiss the indictment. Pet. App. 1-61. The magistrate applied the four-part test established in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), and found no constitutional speedy trial violation.

The magistrate agreed that the eight-year delay between indictment and arrest was "presumptively prejudicial" and warranted an inquiry into the remaining factors. Pet. App. 27-28. Analyzing those factors, the magistrate found that the government had made a good faith effort to obtain custody of petitioner following his arrest in Panama by initiating the expulsion process and that the failure to arrest petitioner after his release in Panama was attributable to "nothing more than 'bureaucratic negligence.'" *Id.* at 35. The magistrate further concluded that once Agent Driver learned that petitioner had traveled from Panama to Colombia, he reasonably assumed that petitioner intended to remain outside the United States in order to avoid apprehension. Moreover, because Agent Driver did not know that petitioner's name had been removed from the TECS computer, the magistrate believed Agent Driver was justified in assuming that petitioner would be arrested by the Customs Service if he attempted to reenter the United States. *Id.* at 37-38. Because the magistrate concluded that the delay was "not intentionally done for tactical reasons," but was instead the result of negligence, he weighed the cause of the delay against the government less heavily than

if the delay had been deliberate. *Id.* at 40-41. The magistrate did not weigh petitioner's failure to assert his right to a speedy trial against him, because there was no evidence that petitioner knew about the charges. *Id.* at 44-45. Finally, the magistrate found that petitioner suffered no prejudice as a result of the delay, in the form of anxiety, pretrial detention, or actual impairment to his defense. *Id.* at 46-51. After weighing all the factors, the magistrate determined that petitioner's right to a speedy trial had not been violated. *Id.* at 52.

The district court reviewed the record de novo, adopted the report and recommendation of the magistrate, and denied the motion to dismiss the indictment. Pet. App. 62-63.

3. The court of appeals affirmed. Pet. App. 64-105. Like the district court, the court of appeals found that the length of the delay rendered the delay presumptively prejudicial and that the government had an obligation to make a diligent, good-faith effort to locate and apprehend petitioner. *Id.* at 78-79. But because the government was, at worst, negligent in its efforts to locate petitioner and did not act in bad faith or with a dilatory purpose, the court did not weigh that factor heavily against the government. *Id.* at 80-86. The court next found that petitioner's failure to assert his right to a speedy trial was a neutral factor, since he was not aware of the outstanding charges. *Id.* at 89-90. Because two of the first three factors thus weighed against the government (length and cause of the delay), the court held that petitioner's "showing of prejudice need not be as strong as if the majority of the factors had weighed against [him]." *Id.* at 92. Even so, the court concluded that petitioner had not made a sufficient showing of prejudice to warrant dismissal. The court observed that petitioner "was never subject to pretrial incarceration and could not have suffered any 'anxiety and concern' relating to his indictment until he first learned of it in September, 1988." *Id.* at 94. The court likewise found that petitioner did not suffer any prejudice after he learned of the indictment, because he had not shown that his defense was impaired. In particular, the court could not find that the loss of some tape-recorded conversations impaired petitioner's defense, because petitioner presented no proof that the tapes contained exculpatory evidence or that the government destroyed them in bad faith, and because the individuals who appeared on the tapes were all available to testify. *Id.* at 96-97. In sum, since petitioner failed to show either that the first three factors weighed heavily in his favor or that he suffered actual prejudice, the court found no Sixth Amendment violation. *Id.* at 98.[3]

ARGUMENT

Both courts below correctly rejected petitioner's constitutional speedy trial claim. To determine whether a defendant's Sixth Amendment right to a speedy trial has been violated, the courts must weigh the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice, if any, to the defendant. *Barker*

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[3] Judge Clark dissented. Pet. App. 98-105. In his view, the government was "grossly negligent" in failing to locate petitioner for eight years, and therefore both the first and second factors of the *Barker* test should be weighed heavily against the government. *Id.* at 101-102. He also believed that the absence of prejudice was insufficient to overcome the force of those factors. *Id.* at 103-105.

v. *Wingo*, 407 U.S. at 530. With respect to the last factor, although "an affirmative demonstration of prejudice" is not essential to a successful speedy trial claim, *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973), a constitutional violation is rarely found in the absence of a showing of actual prejudice. See, *e.g.*, *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986) (the mere possibility of prejudice is not enough to support defendants' speedy trial claim).

In arguing that his Sixth Amendment right to a speedy trial was violated, petitioner does not claim that he was prejudiced by the delay. Instead, he argues (Pet. 17-18) that the court of appeals misapplied the *Barker* v. *Wingo* balancing test because it held, in effect, that "an affirmative showing of prejudice is always required." But that is not what the court of appeals held. To the contrary, the court held that a "defendant need not show actual prejudice * * * if the other three factors weigh heavily against the prosecution." Pet. App. 77. Consequently, the court did not adopt a rule that is inconsistent with *Moore* v. *Arizona*, as petitioner suggests. Instead, the court simply held that in the absence of a demand for a speedy trial or some showing of prejudice, the government's conduct in this case, which the court found to be merely negligent, was not sufficient to tip the scale in favor of dismissal. Compare *Barker* v. *Wingo*, 407 U.S. at 531 ("negligence" is a "more neutral reason" for delay than a "deliberate attempt to delay the trial" in order to hamper the defense). Moreover, the government's conduct and the delay in this case must be assessed in light of the confusion and difficulties occasioned by petitioner's own conduct, his travel to Colombia and Panama, and his arrest in Panama.

The court of appeals' treatment of the issue of prejudice is entirely consistent with the analysis in decisions of this Court. For instance, in *Barker* v. *Wingo*, the Court held that although the "extraordinary" delay in that case was presumptively prejudicial, Barker did not claim that he lost any evidence as a result of the delay, and therefore the "absence of serious prejudice" weighed against him. 407 U.S. at 534. Likewise, in *United States* v. *Loud Hawk*, the Court held that the mere "possibility of prejudice [was] not sufficient to support respondents' position that their speedy trial rights were violated." 474 U.S. at 315. As these cases show, a defendant may not rest on a presumption of prejudice to establish a constitutional violation where there has been no bad faith on the part of the government. Because petitioner apparently was unaware of the outstanding charges, and therefore was neither detained nor anxious as a result of the indictment, he could establish prejudice only by showing that his defense was impaired in some way by the passage of time. He failed to do so. Both courts below balanced the relevant factors in this case, and found that the total absence of prejudice more than outweighed the government's negligence in failing to locate petitioner for eight years. That balancing is all that *Barker* v. *Wingo* and *Moore* v. *Arizona* require.

Petitioner also asserts (Pet. 18) that the court of appeals ignored this Court's statement in *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969), that the government has a "constitutional duty to make a diligent, good faith effort to bring" a defendant to trial. To the contrary, the court of appeals explicitly acknowledged that requirement, stating that "the government has a constitutional duty to make a diligent

good-faith effort to locate, apprehend, and bring to trial the accused." Pet. App. 79. Because the government's effort in this case was insufficient, the court of appeals weighed the "cause of delay" factor against the government. Nevertheless, the court held that where, as here, the delay was not deliberate but was the result of negligence, this factor carries less weight. *Id.* at 85-86. The court of appeals did not, as petitioner suggests (Pet. 18), find that the delay in this case was "deliberate." See generally Pet. App. 79-86.

In short, petitioner's speedy trial claim is predicated on a misreading of the opinion below. The court of appeals carefully and correctly applied the *Barker* v. *Wingo* balancing test to the facts of this case. Because the court's decision is not in conflict with any decision of this Court or any other court of appeals, further review of petitioner's fact-bound claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

FEBRUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20350